

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>98-11743</u>
JOHN D. LONG, JR.)	
)	
Debtor)	
_____)	
)	FILED
JOHN D. LONG, JR.)	at 3 O'clock & 13 min. P.M.
)	Date: 4-16-01
Plaintiff)	
)	
v.)	
)	Adversary Proceeding
CONSECO FINANCE SERVICING, CORP.)	Number <u>00-01087A</u>
f/k/a GREEN TREE FINANCIAL)	
SERVICING CORP.,)	
)	
Defendant.)	

ORDER

By motion, Consecoco Finance Servicing Corp. f/k/a Green Tree Financial Servicing Corp., ("Consecoco"), seeks to stay the adversary proceeding and to compel John D. Long, Jr. ("Debtor") to arbitrate his claims of violations of 11 U.S.C. §362¹ and 11 U.S.C.

¹11 U.S.C. §362(a)(1) &(6) state in pertinent part: Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all

§524(a)². The Court has jurisdiction to hear this matter under 28 U.S.C. §1334 and §157(b)(1) & (2)(A)&(O). Because the claims asserted by the Debtor are not contemplated by the arbitration

entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

²11 U.S.C. §524(a) states in pertinent part:

A discharge in a case under this title--

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

clause in the prepetition contract, the motion is denied.

The facts are as follows. On January 17 1997, Debtor made a promissory note to Consec. The note contains an arbitration clause which states:

ARBITRATION: All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by you with consent of us. This arbitration contract is made pursuant to a transaction in Interstate commerce and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer

to resolve their disputes through arbitration, except as provided therein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY YOU (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law and all other laws, including but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to money damages, declaratory relief and injunctive relief. Notwithstanding anything hereunto the contrary, you retain an option to use judicial or non-judicial relief to enforce a mortgage, deed of trust, or other security agreement relating to the real property

secured in a transaction underlying this arbitration agreement, or to enforce the monetary obligation secured by the real property, or to foreclose on the real property. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgment or to enforce the mortgage or deed of trust, shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this contract, including the filing of a counterclaim in a suit brought by you pursuant to this provision.

On July 1, 1998, Debtor filed a Chapter 7 bankruptcy case in this Court. The Debtor's schedule reflects "Conseco f/k/a Green Tree" as a creditor. Conseco requested and was granted relief from the stay to foreclose upon the collateral. Debtor received his discharge on October 28, 1998. This adversary proceeding was filed August 25, 2000 alleging attempts by Conseco to collect a deficiency

following foreclosure in violation of the automatic stay and the discharge order. Consecro's motion to stay the adversary pending arbitration is now before me.

The arbitration clause, although broad in its language, does not contemplate the present action pending before me. The complaint alleges violations of 11 U.S.C. §362³ & §524. Both of these claims are in the nature of a contempt action and do not arise from or relate to the contract which contains the arbitration agreement. Civil contempt "arises from a willful failure to comply with an order of court such as an injunction." Black's Law Dictionary 223 (5th ed. 1979). As stated in the legislative history of §362:

Because the stay is essentially an *injunction*, the three stages of the stay may be analogized to the three stages of an injunction. The filing of the petition which gives rise to the automatic stay is similar to a temporary restraining order. The preliminary hearing is similar to the hearing on a preliminary

³Although not before the Court, the alleged §362 violation would be subject to a Federal Rule of Civil Procedure 12(b)(6) motion for failure to state a claim upon which relief may be granted because all of the alleged offending conduct occurred after the Chapter 7 discharge. According to §362(c)(2)(C), the stay continues until the time a discharge is granted or denied. 11 U.S.C. 362(c)(2)(C) (1986).

injunction, and the final hearing and order is similar to a *permanent injunction*.

House Report No. 95-595. Enforcing an injunction is an exercise of the court's equitable jurisdiction. N.L.R.B. v. P*I*E* Nationwide, Inc., 894 F.2d 887, 893 (7th Cir. 1990). The enforcement of the stay, an injunction, is integral to the restructuring of the debtor-creditor relationship and is fundamental to the court's equitable jurisdiction. Young v. United States ex rel. Vuitton Et Fils S.A., 481 U.S. 787, 796-98, 107 S.Ct. 22124, 2132-33, 95 L.Ed.2d 740, citing Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450, 31 S.Ct. 492, 501, 55 L.Ed 797 (1911). Aside from any statutory authority granted by Congress, "courts have inherent contempt powers in all proceedings, including bankruptcy to 'achieve the orderly and expeditious disposition of cases.'" Jove Engineering v. Internal Revenue Service (In re Jove Engineering), 92 F.3d 1539 (11th Cir. 1996), quoting Chambers v. NASCO, Inc., 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed 27 (1991). Prior to the enactment of §362(h), the bankruptcy courts held creditors in contempt of court for violations of the automatic stay. See In re Georgia Scale Co., 134 B.R. 69, 72 (Bankr. S.D. Ga. 1991) (Dalis, J.). "The passage of §362(h) was not intended to preclude the use of civil contempt." Id. at 73 citing In re Colon, 114 B.R. 890, 898 (Bankr. E.D. Pa. 1990).

Indeed, civil contempt is utilized to punish violations of the automatic stay when the debtor is a corporation. In re Georgia Scale Co., 134 B.R. at 73.

Likewise violations of §524 are punishable based upon the inherent contempt power of the court. In re Hardy, 97 F.3d 1384, 1389 (11th Cir. 1996). "Civil contempt is the normal sanction for violation of the discharge injunction." 4 Collier on Bankruptcy ¶524.02[2][c] (Lawrence P. King ed., 15th ed. rev. 2000).

In the case sub judice, the arbitration clause contemplates arbitration on any cause of action "*arising from or relating to this contract* or the relationships which result from this contract or the validity of this arbitration clause or the entire contract. . . ." (emphasis added). The complaint alleges violations of the automatic stay and the discharge order. As previously stated, these causes of action are in the nature of civil contempt actions and do not arise from or relate to the contract between Conseco and Debtor. It relates to Conseco's conduct. The arbitration clause does not bind the Court here.

Conseco cites Pate v. Melvin Williams Manufactured Homes, Inc. (In re Pate), Chapter 13 Case No. 95-10919, Adversary Proceeding No. 95-01107 (Bankr. S.D. Ga. July 17, 1996) (Dalis, J.) in support of its motion. In Pate, after noting the strong federal policy

favoring arbitration, I granted the defendant's motion to stay the adversary proceeding and to compel arbitration based on an arbitration clause in that contract that is identical to the arbitration clause presently under consideration. However, in Pate the complaint alleged violations of the Uniform Commercial Code, the Georgia Motor Vehicle Sales Finance Act, and the Truth in Lending Act, all arising from the purchase and financing agreement between the debtor and the defendant. The present case is distinguishable because violations of the automatic stay and discharge order are in the nature of contempt involving the conduct of Conseco and do not arise from or are related to the contract. This Court is free to exercise its inherent power to enforce the automatic stay and its discharge orders.

It is therefore ORDERED that the motion to stay the adversary proceeding and to compel arbitration is DENIED.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 16th day of April, 2001.